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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. ~~1150~~ 230

MRS. MAROWIGNE EDNA McCONNELL SAVOIE,
Administratrix of the Estate of
Horace P. Guidry,

Petitioner,

versus

THE TEXAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CLAY, COLEMAN, DUTREY & THOMSON,
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JAMES JULIAN COLEMAN,
LOUIS J. DUTREY,
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THE TEXAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Mrs. Marowigne Edna McConnell Savoie, Administratrix of the Estate of Horace P. Guidry, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on February 5, 1957, a petition for rehearing of which was denied on April 9,

1957. Said judgment reverses a judgment of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 5, 1957. (r. 240). A petition for rehearing, which was filed timely, was denied on April 9, 1957. (r. 251). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Opinions Below

There is no printed opinion of the judgment of the District Court for the Eastern District of Louisiana. The opinion of the United States Court of Appeals for the Fifth Circuit is printed at 240 F.(2d) 674; the denial of the petition for rehearing at 242 F.(2d) 667.

Questions Presented

(1) Whether the United States Court of Appeals for the Fifth Circuit, in an action brought under the Jones Act, 46 U.S.C. 688, has the right to reverse the finding of the jury on a question of fact that decedent was a seaman, when there was substantial evidence to support the jury's finding.

(2) Whether a jury award of $80,000.00 damages for the death of a 45 year old seaman who left three minor children should not be reinstated when the trial judge incorrectly ordered a remittitur of $40,000.00 and, on appeal to the Fifth Circuit, respondent had opened the issue of reasonableness of damages found by the jury.

Summary and Short Statement of the Matter Involved

Horace P. Guidry, an employee of The Texas Company attached to a 44 foot lugger, the Mary Virginia, was killed on February 4, 1953 by an explosion which occurred on a platfrom in the middle of the 8 or 9 mile wide Lake Salvador, moments after he had stepped off his vessel, the Mary Virginia. The decedent's widow brought suit under the Jones Act for damages in behalf of the three minor children of decedent. The trial judge presented the following questions and received the following answers from the jury:

"WAS THE MARY VIRGINIA OPERATED AND CONTROLLED BY THE TEXAS COMPANY? YES.

IF SO, WAS HORACE GUIDRY A MEMBER OF THE CREW OF THAT VESSEL? YES.

IF SO, WAS THE WORK IN WHICH HE WAS ENGAGED AT THE TIME OF HIS DEATH PURSUANT TO HIS EMPLOYMENT AS A MEMBER OF THE CREW OF THE MARY VIRGINIA? YES.

IF SO, WAS HIS DEATH PROXIMATELY CAUSED BY THE NEGLIGENCE OF THE DEFENDANT OR ITS AGENTS? YES.

IF SO, WAS HORACE GUIDRY GUILTY OF CONTRIBUTORY NEGLIGENCE? . . . NO.

STATE THE AWARD THE PLAINTIFF SHOULD RECEIVE IN THIS CASE. $80,000.00." (r. 201, 202).

The Texas Company, at the close of plaintiff's case (r. 109) and at the close of all the evidence (r. 147) had moved for a directed verdict, but both motions were denied and a verdict was rendered for the plaintiff. Thereafter defendant moved for a judgment *non obstante veredicto* and for a new trial. (r. 203). The trial judge denied the motion for judgment *n.o.v.* (r. 227) but ordered a new trial on the sole question of damages unless plaintiff should enter a remittitur of $40,000.00 within ten days. (r. 231). Plaintiff entered a timely remittitur. (r. 231). Defendant then took an appeal to the Court of Appeals for the Fifth Circuit contending, *inter alia*, that decedent was not a seaman and that the *quantum* found by the jury was "grossly excessive" and "contrary to right reason." (Respondent's brief on appeal, p. 5.) The Court of Appeals on February 5, 1957 reversed the jury's finding of fact that decedent was a member of the crew of the Mary Virginia and held that "he was merely a passenger on the Mary Virginia, and he was not on the boat when he met his death." (r. 239).

A petition for rehearing, calling the court's attention to *Senko v. LaCrosse Dredging Corp.*, 77 S. Ct. 415, was denied on April 9, 1957 on the ground that there was no evidence reasonably tending to show that decedent was a member of the crew. (r. 249).

Decedent was employed by The Texas Company for 16 years prior to his death. The Texas Company witnesses testified that the decedent was classified as a "roustabout." (r. 121). The facts show that a great portion of the decedent's working time was spent on the vessel Mary Virginia, which is a 44 foot lugger. The Mary

Virginia was chartered to The Texas Company by a Mr. John Kennedy and was assigned the task of paraffin scraping the thirty odd wells owned by The Texas Company in Lake Salvador and which are accessible only by water. (r. 131). The Texas Company superintendent called the Mary Virginia a "paraffin scraping vessel." (r. 94). On such duty the vessel went from well to well throughout the lake checking charts and seeing that pipes at the well sites had been cleaned of any paraffin that had accumulated. (r. 125). The work of the Mary Virginia required tying up and casting off from the many well sites many times a day since paraffin scraping and checking recorders is a continuous operation. (r. 125). The Mary Virginia was the only boat doing paraffin scraping in Lake Salvador. (r. 137).

The Texas Company superintendent testified that the normal crew of a vessel such as the Mary Virginia was two men. (r. 98). The charter party of the Mary Virginia was introduced in evidence by The Texas Company without objection. (d. ex. A). Under the charter the jury could clearly see that The Texas Company was to pay $30.00 a day when the owner supplied the necessary two man crew for the Mary Virginia and was to pay only $23.00 a day when it, The Texas Company, supplied the second man in the crew and the owner supplied only one of the crew. On the day of decedent's death, while decedent was shipping aboard the Mary Virginia, the owner had supplied only a one man crew. (r. 119).

The substantial evidence presented to the jury proving conclusively that decedent was a member of the crew of the Mary Virginia was that the decedent had been in

the employ of The Texas Company for 16 years and was familiar with the location of every one of the thirty odd wells located in Lake Salvador. (r. 62). He took charge of the Mary Virginia and assisted in the navigation of the vessel to the extent that he gave orders while aboard as to its course in the lake and its destination. (r. 50, 62). He employed his brother as captain, the other one of the two man crew needed for the Mary Virginia. (r. 51). The brother who testified to these facts was partially paralyzed at the time of the trial and spoke only French. He did make clear, however, that the days on which the owner of the Mary Virginia supplied two men, one of them would "drive" or steer the boat and the other one would perform services as a crew member, such as tying up and untying when the Mary Virginia touched at the thirty odd platforms in the lake. (r. 64). The Texas Company's witness Badeaux, who was an assistant to the decedent, admitted that it was his job and the decedent's to tie up the Mary Virginia as it touched at well 20, the place of the explosion and just moments before the explosion occurred. (r. 119). The decedent's regular pay as a member of the crew of the Mary Virginia started when he went aboard the Mary Virginia on Lake Salvador each day and stopped in the evening when he disembarked from the lugger. (r. 97). He received regular pay for the whole time he was aboard the Mary Virginia shipping on Lake Salvador. (r. 97).

The evidence showed conclusively that the boat owner supplied a two man crew only two days a week (r. 62, 63) and the balance of the time the decedent worked as a member of the crew with the other crewman. The evidence also shows that The Texas Company saved

$7.00 a day when the owner supplied only one man for the crew and their employee, the decedent, performed the necessary services of the second member of the crew to operate the 44 foot lugger which, by the uniform testimony of both plaintiff's and defendant's witnesses, *required a two man crew.*

Reasons Relied on for Writ of Certiorari

The decision of the United States Court of Appeals for the Fifth Circuit which reverses the finding of the jury that decedent was a member of the crew of the Mary Virginia deprives petitioner of her right to a jury determination of such fact as guaranteed by the Seventh Amendment to the Constitution of the United States. No question was raised herein as to whether the vessel involved had the status of a "vessel" at the time of decedent's death. Testimony of both plaintiff's and defendant's witnesses proved conclusively a fact which the jury had to find and that was that a 44 foot lugger doing the work of the Mary Virginia as a paraffin scraping vessel on Lake Salvador needed the complement of a two man crew. The Texas Company used the decedent as the second man on the Mary Virginia every day except the two days when the owner supplied the two man crew. The Texas Company saved $7.00 a day by doing the logical thing in having its employee, who navigated the vessel, employed the crewman for the vessel, arranged for the crewman's pay, perform the services as the extra member of the crew, which services included, among other things, the tying and untying of the vessel many times a day as it approached and departed from the thirty odd locations

scattered throughout Lake Salvador. The services as a crewman performing this necessary duty is clearly distinguishable from the harbor worker who throws or catches one line perhaps once a day when a ship is docked or departs. The Fifth Circuit, in their opinion, found a fact that was not only contrary to the jury's finding, but clearly contrary to the evidence when they state that the decedent's ". . . duties did not pertain to navigation, nor even to the casual task of throwing a rope or making the boat fast . . ." (r. 239).

Badeaux, The Texas Company's own witness, clearly stated and admitted that The Texas Company employees tied up the Mary Virginia just prior to the accident on well No. 20, (r. 119) and counsel for defendant, The Texas Company, admitted in his argument before the jury that the testimony showed that the decedent did handle lines "every once in a while." (r. 173). It is submitted that the Fifth Circuit not only has reversed the jury's finding of fact, but has found facts that reversed the actual evidence in the record.

The decision of the Court of Appeals below, in reversing the finding of the jury on a question of fact substantiated by the evidence, is so prejudicial to the spirit and principles of law contained in *Senko v. LaCrosse Dredging Corp., supra*, as to amount to a deprivation of petitioner's right to jury determination of facts guaranteed by the Seventh Amendment to the Constitution of the United States. The instant case, following on the heels of *The Texas Company v. Martin*, 350 U. S. 879, reversing 222 F.(2d) 382, may furnish "special and important reasons for the grant of certiorari . . . when

lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers v. Missouri Pacific Railroad Co.*, 77 S. Ct., 443, 451 (1957).

Petitioner presented to the jury three arguments on the evidence which, it is submitted, singly or together, support "with reason" the conclusion of the jury. These arguments may be stated briefly as follows:

(a) The total function or service of the Mary Virginia was as a paraffin scraping vessel. The decedent was the chief paraffin scraper for his employer in the Lake Salvador field. Therefore, the work of the decedent was so integrated with the service of the vessel as to make him a member of her crew.

(b) The Mary Virginia required a two man crew for normal operation. However, on all but two days of each week the vessel was not supplied with a full crew. When a regular crewman was absent the decedent became a member of the crew by performing his duties.

(c) The decedent was more than a mere passenger aboard the Mary Virginia. The admitted crew members looked to him for their orders. He controlled the course and destination of the vessel. He assisted in tying up when necessary. He was, in effect, the captain *pro hac vice* and therefore a member of the crew.

The decision of the Fifth Circuit states that ". . . decedent was employed as a roustabout . . . he was em-

ployed to work on the platforms, not on the vessel." (r. 239). The important thing is not the conditions of decedent's original employment, or what title he was given, but what duties he performed in the course of his employment with the consent of his employer. The jury may well have inferred from the evidence that The Texas Company found it expedient to permit decedent to serve as the second crew member at a saving of $7.00 per day to the company.

The decision of the Fifth Circuit further states the decedent's duties did not pertain ". . . to the casual task of throwing a rope or making the boat fast, a service that readily could be performed by a harbor worker." (r. 239). However, the decedent's work of tying up and casting off the Mary Virginia was not the sort of work that readily could be performed by a harbor worker for the reason that the work took place on thirty odd well sites scattered throughout Lake Salvador. Obviously the Mary Virginia required a crewman to be constantly aboard to render this service.

It is conceded that the Mary Virginia was a vessel in navigation within the meaning of the Jones Act, and it is not questioned that decedent had a "more or less permanent attachment" to the vessel. There remains the narrow point of whether the proof was reasonable to support the jury's finding that decedent's duties were "in aid of navigation" upon which the Fifth Circuit relies for its reversal of the jury. We submit that the proof on this narrow point is not only sufficient but is in the preponderance that decedent assisted in the navigation of

the Mary Virginia and contributed to the "functioning of the vessel as a vessel."

The record discloses that the charts on each one of the thirty odd wells in Lake Salvador had to be checked about every day and to do so the Mary Virginia would pull up to the well site, the decedent would then check the chart, get back on the boat and go off, the Mary Virginia going from well to well in this manner. In addition to checking the charts, the Mary Virginia's routine duty included paraffin scraping at any one of the wells which needed the service to be performed. The jury correctly found that it required two men to operate a 44 foot lugger and accomplish its mission, as brought out by defendant's witness, Mr. Lottinger.

If there were no other evidence at all for a reasonable basis for the jury's finding, it is the fact that the Mary Virginia needed two men as a normal crew on a boat of its size performing its services. The questioning of Mr. Porter, superintendent of The Texas Company's operation in Lake Salvador, confirmed this undisputed fact. Mr. Porter testified as follows:

"Q. What is the normal crew on a boat of the type of the Mary Virginia?

A. Two men." (r. 98).

The questioning of Mr. Badeaux, The Texas Company's employee and witness, who was also an eye witness to the decedent's death, was as follows:

"Q. When you got to a well who ties up?
A. Well, it is supposed to be a two man crew, but that day they only had one man. We had to tie up the boat that day." (r. 119).

In the face of the above quoted testimony upon what basis could the Court of Appeals hold that The Texas Company employees aboard the Mary Virginia were "passengers who did not even perform the casual task of throwing a rope or making a boat fast"? How more reasonable is the finding of the jury that decedent, who was aboard the Mary Virginia for many years being paid full time while aboard, did perform the services of a member of the crew as the vessel proceeded about its daily task upon the thirty odd well sites scattered throughout the lake.

Not one iota of evidence can be found in the record or in the opinion of the Fifth Circuit setting aside the fact or denying that the Mary Virginia needed a two man crew and that The Texas Company arranged through its charter that the cost of the charter would be reduced $7.00 per day when the owner supplied but one man. The obvious question to all, since the evidence shows conclusively the owner supplied a full crew only two days a week and the Mary Virginia operated every day, is "Where did the other crewman come from?" The answer is equally obvious that the other crewman was the other man aboard the Mary Virginia—the decedent, Horace P. Guidry.

The Jury Award of $80,000.00 Damages for the Death of a 45 Year Old Seaman Who Left Three Minor Children Should Be Reinstated, Since Respondent Has Opened the Issue of Reasonableness of the Quantum and the Record Supports the Jury Determination of Damages.

At the time of his death the decedent, at age 45, was in the position of a trusted, experienced employee of The Texas Company who could look forward to years of increased earnings for the benefit of his three children. The jury award of $80,000.00 represented a determination of fact that the children were entitled to be compensated the amount of their loss, calculated on the basis of earnings figures *submitted to them over the signature of The Texas Company Division Accountant.* No question has been raised at anytime as to the propriety and correctness of the instructions of the trial judge given to the jury with respect to the award of damages.

The determination of damages by the instant jury was eminently correct, based as it was upon undisputed earnings figures, and petitioner has attached hereto an appendix setting forth a reasonable basis for the jury's findings of damages. (See Appendix I). The trial judge fell into error when he ordered a remittitur of one-half the jury verdict, his error consisting of (1) failure to give any consideration to the six week's earnings of decedent immediately prior to his death; and (2) promulgation of a fixed rule or formula for the calculation of loss of support not hitherto authorized in Jones Act suits. Petitioner, it is true, accepted the remittitur and did not appeal from the new trial order upon which the remittitur was conditioned. (r. 231). However, an order granting or denying a new trial is not appealable, and peti-

tioner accepted the remittitur because, under the circumstances, a new trial would not have changed the facts with respect to decedent's earnings, and, therefore, any verdict in excess of $40,000.00 which might be rendered in a new trial or, indeed, in successive new trials, would be subject to the same remittitur by the trial judge under his announced ruling.

Once having accepted the remittitur petitioner could not then appeal from the verdict. *Woodworth v. Chesbrough*, 244 U. S. 80 (1917). Petitioner was in the position of not being able to obtain appellate review of the errors of the trial judge with respect to review of the jury award of damages, whether petitioner accepted or rejected the remittitur. *Cf. Kanatzer v. Chrysler Corp.*, 199 F.(2d) 610 (C.C.A. 10th 1952).

The Texas Company, however, applied to the Court of Appeals for the Fifth Circuit to review the *quantum* found by the jury and thus, it is submitted, the issue of reasonableness of the jury's award has been opened anew by the action of The Texas Company. This Honorable Court, it is submitted, should therefore reinstate the jury verdict if, in the course of review herein, it should find itself in agreement with petitioner that error was committed in remitting the award of $80,000.00 by the jury.

The trial judge declined to give any effect whatever to the earnings of the decedent for the year 1953, saying:

> "There is no question about the earnings figure. The earnings figures for '51 and '52 were $4,400 and $4,700, and certainly reasonable people will take those figures rather than six weeks of '53 in

arriving at what the pay was annually. That's how simple it is to me." (r. 228, 229).

Why should reasonable people who are charged with the duty of determining the amount of loss of a man's earnings in the future disregard the wages received by decedent for the period immediately prior to his death, however brief that period might be? The jurors were not instructed by the court to ignore the evidence of decedent's earnings for the year 1953. The Texas Company made no such request that such earnings be ignored and, it is submitted, if the jurors had been charged "as reasonable men in determining the loss of future wages you are to give no account to the '53 earnings of decedent", such instruction would have constituted reversible error.

Prior to the trial of this case petitioner exhausted the legal remedy available to her for the purpose of securing a complete 16 year record of the wages paid decedent by The Texas Company. Petitioner moved the trial court for permission to inspect such records under the discovery rules of civil procedure. (r. 11, 12). The motion to produce the wage record of decedent was contested by The Texas Company which argued that to produce a 16 year record would cast upon it an undue burden. As a result of this argument, the court ruled that The Texas Company only had to reveal the earnings of decedent for the three years immediately prior to his death. In compliance with this ruling The Texas Company made available to petitioner a letter from Mr. J. O. Parris, Division Accountant of The Texas Company, stating the "total wages" of decedent for the years 1951, 1952 and 1953. This letter was introduced in evidence by peti-

tioner without objection and later argued to the jury as proof of damages without objection from any quarter. The letter in question reads as follows:

P. O. Box 252
New Orleans 9, La.
March 9, 1956

Mr. E. A. Carrere
407 California Company Building
New Orleans, Louisiana

Dear Sir:

In compliance with your telephone request to our Harvey District Office for a statement of earnings of Mr. Horace Guidry for the years of 1951, 1952 and 1953 until his death, we are enclosing herewith photostatic copies of Form PO-62, Employe's Record which shows that Mr. Guidry earned the following:

Year	Total Wages
1951	4,399.10
1952	4,674.07
1953	929.01

We trust the attachments will enable you to proceed with your handling of this claim. If however, we can be of future assistance, please advise.

Yours very truly,

THE TEXAS COMPANY
Producing Department
/Sgd J. O. Parris
Division Accountant

There is no rule of law which would prohibit the jury from relying upon the earnings figures as furnished by a seaman's employer to fix loss of wages in the future as an element of loss sustained by his survivors. The logical result of consideration of the three year picture of decedent's wages is that decedent would have earned, had he lived, an annual wage in excess of the $4700.00 annual wage used by the trial judge in his calculation. Further, when the evidence is viewed in the light most favorable to petitioner, in accordance with law, it is fair to state that the record supports a finding of damages by the jury in the amount of $80,000.00.

Even where there is no question about a seaman's earnings before death, his future earnings cannot be foretold, in effect, by placing a "ceiling" on such future earnings as was done by the trial judge. (r. 230). Although the jury was instructed that the ascertainment of future loss of support is not subject to "precise mathematical calculation", (r. 195) the lower court, in its review of the award of damages, after the jury had made its determination pursuant to instructions, attempted to bring such uncertainties within the operation of fixed rules of calculation as follows:

> "Using the 1952 earnings, $4,700, about $500 of that would be tax, so you would get down to about $4,200. There are three children. The Court feels that $3,000 of that probably would be a fair amount to give to the children during the time the three children were all minors; that is, leaving only $1,200 for the father himself to live on, which isn't giving him too much. After the first child became a major, then the Court would

be inclined to cut the $3,000 by one-fourth—not one-third because there would still be the necessity to maintain a home for the remaining two minors, and consequently one-third would be unrealistic in view of the fact the home would nevertheless have to be maintained. When the second child arrives at majority, the Court would be inclined to cut the award further to one-half of that $3,000, or $1,500 for the third child during the balance of its minority." (r. 230).

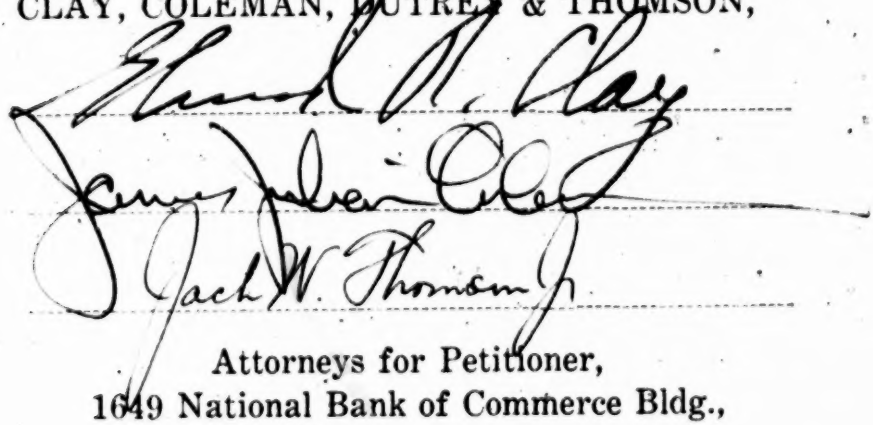
One example of the error inherent in fixed rules for the calculation of loss of future support is that the jury has no room for determination of the degree of sacrifice which the decedent may have made in the future for his children. Is it not logical to conclude that if this decedent would have denied himself for the benefit of his three children when they were all minors by retaining only a small portion of his earnings for himself, that he would have continued to make an equal sacrifice later for the benefit of two children during their minority and then his only son during his minority?

Fixed rules for the ascertainment of loss of future support cannot be allowed to supersede the function of the jury which is to determine the specific amount of damages in a given set of circumstances. An award of damages in the amount of $83,000.00 in a death claim was affirmed by the Fifth Circuit where the facts relating to *quantum* were not too different from the facts of the instant matter. *Dowell, Inc. v. Jowers*, 182 F.(2d) 576 (C.C.A. 5th 1950). It is submitted that this Honorable Court should reinstate the original determination of damages by the jury since the jury finding of fact of damages is clearly supported by the record.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to the end that this cause may be reviewed by this Honorable Court; that the judgment of the Court of Appeals for the Fifth Circuit be reversed; that the original award of the jury in the amount of $80,000.00 in favor of petitioner be reinstated; and, in the alternative, that the judgment of the District Court of the United States for the Eastern District of Louisiana in the amount of $40,000.00 in favor of petitioner be reinstated; and that petitioner be granted all general and equitable relief as the nature of the case may afford.

Respectfully submitted,

CLAY, COLEMAN, DUTREY & THOMSON,



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APPENDIX I.

Let us assume an earning capacity of $7,332.00 per year, computed on the basis of $705.00 for the first 35 days of 1953 earned by the decedent (thereby eliminating the $224.00 portion of such earnings which, after the trial, were argued to be vacation pay); and further assume that $6,000.00 of which would have been expended directly or indirectly, for the support of three children. Thus 3-1/6 years support, undiscounted, would have accrued on the date verdict was rendered or $19,000.00.

The oldest child will attain majority in approximately six years from date of verdict, so $6,000.00 per year would be due, discounted at 2-3/4% (U. S. Series E Bond rate of return) for those six years. However, those yearly amounts should accrue to the children at the beginning of each year, since an annuity due is payable at the commencement of the period unit, and thus the first year should not be discounted. Using the standard table of future values we find.

Year	Present value of $1000.00	Amount discounted (thousands)	Present value
1 (now)	$1000.00	6	$ 6000.00
2	973.24	6	5839.44
3	947.19	6	5683.14
4	921.84	6	5531.04
5	897.17	6	5383.02
6	873.15	6	5238.90
			$33,675.54

After six years the eldest child reaches majority, and decedent would then have been supporting two children, a condition which would continue for another five years. Using the same rate of discount and $4,000 as the proper amount of support we get:

7	$ 849.78	4	$ 3399.12
8	827.04	4	3308.16
9	804.19	4	3219.64
10	783.36	4	3133.44
11	762.40	4	3049.60
			$16,109.96

At the end of the preceding period decedent would then be supporting his remaining child and only son, and it is not unreasonable to suppose the jury would anticipate a contribution of $4,000 per year for the only child. Again using the table we find:

12	$ 741.99	4	$ 2967.96
13	722.13	4	2888.12
14	702.81	4	2811.24
			$ 8667.72

Recapitulation

	$19,000.00
	33,675.54
	16,109.96
	8,667.72
Total	$77,453.22

APPENDIX II.

OPINION OF THE COURT

Filed February 5, 1957.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,188

THE TEXAS COMPANY,

Appellant,

versus

MRS. MAROWIGNE EDNA McCONNELL SAVOIE, ADMINISTRATRIX OF THE ESTATE OF HORACE P. GUIDRY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(February 5, 1957.)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

HOLMES, Circuit Judge: The appellee, as administratrix of the estate of her deceased husband, brought this suit against the appellant, the decedent's employer, for

recovery of damages, under the Jones Act, for the death of her husband, predicating liability upon negligence, while decedent was acting as a member of the crew of the Mary Virginia, a vessel operated and controlled by appellant on Lake Salvadore.

The plaintiff alleged that on February the 4th, 1953, at Well No. 20 in Lake Salvadore, the deceased was in the process of opening a valve, which exploded and blew him off the well platform into the water and caused his death. Several grounds of negligence were alleged, among which were that the valve was defective, which fact should have been known to the Texas Company; that the company failed to furnish a sufficient number of competent employees; and failed to furnish a safe place for the decedent to work. In the alternative, plaintiff sought to recover under the Longshoremen's & Harborworkers' Act, and under the Louisiana Workmen's Compensation Law. These alternatives were reserved by agreement, and are not before the court at this time. The trial below resulted in a verdict and judgment for the plaintiff.

The decisive point on this appeal is whether there was substantial evidence to support the jury's finding that decedent was a member of the crew of the Mary Virginia, which is a question of fact. In denying the motions below, the court said that if it were "writing on a new slate before Martin," it might have some misgivings as to this finding. The court was referring to *Texas Company v. Gianfala*, 222 F. (2) 382, 350 U. S. 879, 76 S. Ct. 141; rehearing denied Jan. 30, 1956, 76 S. Ct. 346. The appellant's contention is that, at the time of his death, the decedent was not in the service of the vessel Mary Vir-

ginia, and that there is no substantial evidence to support the jury's findings on this point.

We agree with appellant that the Supreme Court in the Martin case did not intend to do away with the established federal procedure, whereby in a civil action at law the judge may direct a verdict if there is no issue of fact to be submitted to the jury on a decisive issue; provided, of course, even where there is no conflict in the evidence, if reasonable minds may fairly draw conflicting inferences from the same evidence, requiring different verdicts, the issue is for the jury to determine the correct inference.

From the undisputed facts in this case, the decedent was employed as a roustabout by appellant. He was employed to work on the platforms, not on the vessel. There is no substantial evidence to support the jury's finding that he was a member of the crew. He was an oil-field worker strictly, and not a boat crewman. His duties did not pertain to navigation, not even to the casual task of throwing a rope or making the boat fast, a service that readily could be performed by a harbor worker. He had no such duties to perform. He was merely a passenger on the Mary Virginia, and he was not on the boat when he met his death.

The judgment appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

JUDGMENT.

Extract from the Minutes of February 5, 1957.

No. 16,188

THE TEXAS COMPANY

versus

MRS. MAROWIGNE EDNA McCONNELL SAVOIE, ADMINISTRATRIX OF THE ESTATE OF HORACE P. GUIDRY

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Mrs. Marowigne Edna McConnell Savoie, Administratrix of the estate of Horace P. Guidry, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,188

THE TEXAS COMPANY,

Appellant,

versus

MRS. MAROWIGNE EDNA McCONNELL SAVOIE, ADMINISTRATRIX OF THE ESTATE OF HORACE P. GUIDRY,

Appellee.

PETITION FOR REHEARING ON BEHALF OF APPELLEE.

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Mrs. Marowigne Edna McConnell Savoie, administratrix of the estate of Horace P. Guidry, appellee, respectfully petitions this Honorable Court for a rehearing of the above captioned matter, in which a judgment was rendered February 5, 1957.

The grounds of this petition are as follows:

(1) The decision of this Court is in violation of Amendment 7 of the United States Constitution which reads as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

(2) The decision of this Court, although through another route, reaches the same result as the United States Supreme Court has already ruled is not the law of the land in *Texas Company v. Gianfala*, 222 F. (2d) 382, 350 U. S. 879, 76 S. Ct. 141; rehearing denied Jan. 30, 1956, 76 S. Ct. 346.

WHEREFORE, petitioner prays that this petition for rehearing should be granted.

CLAY, COLEMAN,
DUTREY & THOMSON,
/s/ JAMES JULIAN COLEMAN
By /s/ JACK W. THOMSON, JR.
Attorneys for Appellee,
1649 National Bank of Commerce Bldg.,
New Orleans, Louisiana.

CERTIFICATE.

I certify that the foregoing petition for rehearing is filed in good faith and not for delay and that a copy of the foregoing motion has been forwarded to counsel of record for the Appellant, Messrs. May & Carrere, California Company Building, New Orleans, Louisiana, this 25th day of February, 1957.

/s/ JACK W. THOMSON, JR.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,188

THE TEXAS COMPANY,

Appellant,

versus

MRS. MAROWIGNE EDNA McCONNELL SAVOIE,
ADMINISTRATRIX OF THE ESTATE OF
HORACE P. GUIDRY,

Appellee.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

May It Please the Court:

This Honorable Court states in their decision that the decisive point on this appeal is "a question of fact" whether there was substantial evidence to support the jury finding that decedent was a member of the crew of the "Mary Virginia". In the same opinion the Court states that it has no authority, nor does any federal judge have authority to take out of the hands of the jury questions of fact even where there is no conflict in the evidence as long

as "reasonable minds may fairly draw conflicting inferences from the same evidence." After succinctly stating the law, the Court then holds that the issue is not for the jury to determine a correct inference but that the Court itself reverses the jury and makes its own inferences.

The Court states that "the undisputed facts in the case" were that the decedent was employed as a "roustabout" by The Texas Oil Company. This fact is very much disputed and in truth the plaintiff and the jury found that the real facts are that the decedent was employed and did perform important admiralty services aboard the "Mary Virginia"; that he actually was a seaman aboard the "Mary Virginia"; that he handled its navigation; that he employed either a captain or a relief seaman to man the lugger; and continued to do this throughout a major portion of his fifteen years of employment while he shipped on the "Mary Virginia". Does a "roustabout" employ a captain on a boat? This Court drew the inference that he did. The jury drew an inference that this was not so. Is this a question of fact?

This Court drew the inference that one man could handle a 44-foot lugger by himself while the jury came to the reasonable decision from the evidence presented that no one man could bring a 44-foot lugger up throughout a lake, stop and start many times near wells, tie up, untie, move to a new location and do everything necessary in navigating and handling a 44-foot lugger by himself. The jury knew it would take two men. The defendant, The Texas Company, knew it would take two men. This Court undoubtedly has drawn a different inference from the facts and the documentary evidence that The Texas

Company in their charter party called for two men aboard the lugger and when they supplied the seaman in the form of the decedent they would naturally be rebated for the cost and expense of the necessary seaman required to handle the 44-foot lugger, "Mary Virginia".

In fact this Court's opinion finds disputed facts even more favorable to the defendant than even the defendant claims as it has never been questioned that the decedent handled a line of the "Mary Virginia". (Defendant counsel's argument, R. p. 173). The only issue is whether questions of fact pertaining to seamen cases will be handled by directed verdicts and exclusively by district judges and this Court, or whether or not the constitutional right granted under the Seventh Amendment is to remain the right endowed and inherited by any United States citizen who desires a trial by jury. This Court may have an honest disagreement with the twelve men who heard this case and found the facts, but that is not the issue. The United States Supreme Court has sustained a seaman's right for trial by jury in the decision in the *Martin* case which went up from this same Court and it is respectfully submitted that the higher authority of that Court should be acceptable and govern the decision of this Court. The mere fact that District Judge J. Skelly Wright made a gratuitous statement in order not to be too harsh in overruling the motion for directed verdict is no ground for the inference that this learned District Judge was ignorant of his right when there was no issue of fact involved to order a directed verdict if he so desired. This gratuitous statement was in no way disrespectful of the United States Supreme Court's decision in the *Martin* case nor disrespectful of the rights granted to a litigant to use

the trial by jury granted to him under the Seventh Amendment of the United States Constitution.

The Texas Company knew that the decedent was continually working aboard the "Mary Virginia", saving them the expense of an extra seaman. This case is not in the category of men working on off-shore drilling rigs. The decedent was no more a passenger aboard, over the many years before his death, than an able bodied seaman shipping on a luxury liner. The mere fact that a seaman is killed off shipboard while performing his duties certainly does not relieve his employer from liability under the Jones Act.

This Court has erred in this opinion and true justice, in our humble opinion, calls for a rehearing and reappraisal in order that right shall prevail.

Respectfully submitted,

CLAY, COLEMAN,
DUTREY & THOMSON,
/s/ JAMES JULIAN COLEMAN
By /s/ JACK W. THOMSON, JR.,
Attorneys for Appellee,
1649 National Bank of Commerce Bldg.,
New Orleans, Louisiana.

CERTIFICATE.

I certify that a copy of the foregoing has been forwarded to counsel of record for the Appellant, Messrs. May & Carrere, California Company Building, New Orleans, Louisiana, this 25th day of February, 1957.

/s/ JACK W. THOMSON JR

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,188

THE TEXAS COMPANY,

Appellant,

versus

MRS. MAROWIGNE EDNA McCONNELL SAVOIE, ADMINISTRATRIX OF THE ESTATE OF HORACE P. GUIDRY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 9, 1957.)

ON PETITION FOR A REHEARING.

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

HOLMES, Circuit Judge: The motion of appellee for leave to file twenty photostatic copies of the decision of the Supreme Court in *Senko v. LaCrosse Dredging Corporation*, No. 62, Oct. Term, 1956, should be overruled, because all the judges of this court already have printed

copies of said opinion, and to file twenty photostatic copies of the same would unnecessarily encumber the records in the clerk's office.

After a careful consideration of the petition for rehearing, including said Senko opinion, we think that the petition should be denied, because the applicable legal principle announced in *Senko v. LaCrosse Corporation* was the law which we announced and applied in the instant case. The factual distinction between the two cases is that in the one before us there was no evidence reasonably tending to show that the decedent was a member of the crew; whereas in the one cited there was sufficient evidence to support the finding, the Supreme Court holding that there was sufficient evidence in the record for the jury to decide that the petitioner was permanently attached to and employed by the dredge as a member of its crew. No question was raised as to whether the dredge involved had the status of a vessel at the time of the injury.

The essence of the decision in the Senko case was that the determination of whether an injured person was a member of the crew was to be left to the finder of fact, which means that juries have the same discretion in determining whether an injured person was a member of a crew as they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis to support it, whether or not the appellate court agrees with the jury's estimate.

In the federal court a jury's finding of fact must have substantial evidence to support it; a scintilla of evidence

is not sufficient. There was substantial evidence to support the finding in *Senko v. LaCrosse Dredging Corporation*, because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit. For this reason, the decision below was reversed, and the case was remanded for judgment on two issues which the appellate court did not reach in its disposition of the case.

The petition for rehearing is DENIED.

ORDER DENYING REHEARING.

Extract from the Minutes of April 9, 1957.

No. 16,188

THE TEXAS COMPANY

versus

MRS. MAROWIGNE EDNA McCONNELL SAVOIE, ADMINISTRATRIX OF THE ESTATE OF HORACE P. GUIDRY

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.